No. 82-1508

In the

Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN DENTAL ASSOCIATION, and
DR. JOSEPH P. CAPPUCCIO,

Petitioners,

vs.

DONALD R. MYERS,

Respondent.

PETITIONERS' REPLY BRIEF

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Petitioners, the American Dental Association ("ADA") and Dr. Joseph P. Cappuccio ("Dr. Cappuccio"), file this brief in reply to respondent's opposition.

I. PRELIMINARY STATEMENT.

As a result of this Court's decision in *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975), numerous professional associations have been sued for alleged violations of the antitrust laws. In each instance an important threshold consideration is whether venue is proper pursuant to 15 U.S.C. §22. Although *Goldfarb* was decided in 1975 this Court has not defined what constitutes "transacting business" as that term is applied to non-profit professional associations within the meaning of Section 22.

At the present time it is especially important for this Court to make this determination because there is a clear conflict between the majority opinion and the decision of the Fourth Circuit Court of Appeals in *Bartholomew* v. *Virginia Chiropractors Ass'n, Inc.*, 612 F.2d 812 (4th Cir. 1979), *cert. denied*, 446 U.S. 938 (1980), as to the proper application of the "transacting business" test to non-profit professional associations.

As the facts demonstrate in the instant case, venue can be used as a means of harassing a professional association especially in the context of a weak case on the merits, which is also the situation here. It is highly unfair to make a professional association defend itself thousands of miles from its domicile and this tactic should be brought to an end by this Court allowing the Petition for Certiorari and by holding that there must be a "substantial connection" with the forum in order to satisfy 15 U.S.C. §22.

II. RESPONDENT CONCEDES THAT THE DECISION OF THE THIRD CIRCUIT CLEARLY CONFLICTS WITH THE DECISIONS OF THIS COURT AND OF OTHER CIRCUIT COURTS OF APPEALS REGARDING THE BURDEN OF PROOF IN OBJECTIONS TO VENUE.

Respondent, by attempting to explain away the significance of the majority decision on who has the burden of proof, plainly concedes that the majority's determination, that petitioner bore the burden of proof, directly conflicts with the decisions of this Court and of the Courts of Appeals for the First, Fourth, Seventh and Ninth Circuits. *See, e.g., Aro Mfg. Co., Inc.* v. *Automobile Body Research Corp.*, 352 F.2d 400 (1st Cir. 1965), *cert.*

denied, 383 U.S. 947 (1966); *Bartholomew* v. *Virginia Chiropractors Ass'n, Inc.,* 612 F.2d 812 (4th Cir. 1979), *cert. denied,* 446 U.S. 938 (1980); *Grantham* v. *Challenge-Cook Bros., Inc.,* 420 F.2d 1182 (7th Cir. 1969); *Phillips* v. *Baker,* 121 F.2d 752 (9th Cir. 1941).

The foundation of the Third Circuit majority's decision that venue was properly laid in the Virgin Islands pursuant to 15 U.S.C. §22 was its determination that petitioner ADA had the burden of proving that such venue was improper. (App. 20a-21a). The majority gave considerable attention to the issue of burden. (App. 18a-23a). This was necessary in order to justify its ultimate erroneous conclusion that venue was proper despite the absence of record facts in support thereof and respondent's decision not to argue Section 22 venue in either the trial court or the Court of Appeals. (*See* Dissenting Opinion by Judge Garth at App. 41a-42a).

The majority's protracted explication on burden of proof did not "slip" into its opinion, as respondent suggests. It is clear that the majority's conclusion that venue in the Virgin Islands was proper was entirely premised on its tortured decision that petitioners bore the burden of proof. Respondent cannot gloss over the fact that the majority's holding represents a radical departure from the well established, accepted and usual course of judicial proceedings with regard to venue objections.

Respondent also ignores the important holding of this Court in *Leroy* v. *Great Western United Corp.,* 443 U.S. 173 (1979), with respect to venue. This Court clearly stated that the purpose of statutorily specified venue is

to protect the defendant against an unfair or inconvenient place of trial and that the plaintiff must "justify its choice of forum." 443 U.S. at 183-184. By placing the burden of proof on the defendant the Third Circuit has adopted a rule of law with respect to venue which is directly contrary to the principle enunciated by this Court in *Leroy*.

The further contention that there is no question to be resolved as to burden of proof because respondent has satisfied any burden of proof which could have been placed upon him is both simplistic and erroneous. If respondent had established venue, there would have been no need for the majority to rest its decision on who had the burden of proof. (Maj. Op. at App. 23a, Diss. Op. at App. 44a-45a, 52a, 54a-56a).

CONCLUSION

For the reasons set forth herein and in the Petition, petitioners respectfully pray that this Court grant the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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